IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA,
SOUTH BEND DIVISION

THE FRESH MARKET, INC,	)	
Plaintiff,	)	
v.	)	Civil Action No.______
MARSH SUPERMARKETS, INC., TRADEMARK HOLDINGS, INC.,	)	
Defendants.	)	

COMPLAINT FOR TRADEMARK
INFRINGEMENT AND UNFAIR COMPETITION

Plaintiff The Fresh Market, Inc., by its undersigned attorneys, alleges as follows, upon actual knowledge with respect to itself and its own acts, and upon information and belief as to all other matters:

Nature of the Action

1. This is a civil action for trademark infringement and unfair competition arising under federal and state common law. The Fresh Market brings this action against Defendants Marsh Supermarkets, Inc. and Trademark Holdings, Inc. (collectively "Marsh") because Marsh recently opened a specialty food store similar in size and concept to Plaintiff's chain of THE FRESH MARKET stores, using the similar name ARTHUR'S FRESH MARKET. Marsh also obtained a federal trademark registration for the mark ARTHUR'S FRESH MARKET, which The Fresh Market seeks to cancel through this action.

The Parties

2. The Fresh Market, Inc. is a North Carolina corporation having its principal place of business at 628 Green Valley Road, Greensboro, North Carolina 27408.

3. Defendant Marsh Supermarkets, Inc. is an Indiana corporation having its principal place of business at 9800 Crosspoint Boulevard, Indianapolis, Indiana 46256.

4. Defendant Trademark Holdings, Inc. is a Delaware corporation having its principal place of business at 1105 North Market, Suite 1300, Wilmington, Delaware 19801. Trademark Holdings is a holding company for Marsh that owns Marsh's trademarks.

Jurisdiction and Venue

5. This action arises under the federal Trademark Act, 15 U.S.C. § 1051, *et. seq*., and under the related common law of the state of Indiana. Subject matter jurisdiction over this action is conferred upon this Court by 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(a) and (b). This Court also has diversity jurisdiction under 28 U.S.C. § 1332 because The Fresh Market and Marsh/Trademark Holdings are citizens of different states, namely, North Carolina and Indiana/Delaware, respectively, and the amount in controversy exceeds $75,000.00 exclusive of interest and costs. Pursuant to 28 U.S.C. § 1367, this Court has supplemental jurisdiction over The Fresh Market's state common-law claims because those claims form part of the same case or controversy as The Fresh Market's federal Lanham Act claims.

6. This court has personal jurisdiction over Marsh, and venue is proper in the Northern District of Indiana pursuant to 28 U.S.C. § 1391(b), because a substantial part

of the events or omissions giving rise to The Fresh Market's claims occurred in this district in that Marsh is using the infringing ARTHUR'S FRESH MARKET mark and name in this District.

The Fresh Market and its Name and Trademark THE FRESH MARKET

7. Since at least as early as March 5, 1982, The Fresh Market has operated a chain of specialty retail grocery stores under the name and mark THE FRESH MARKET.

8. The Fresh Market prides itself on offering quality products at reasonable prices and providing exceptional customer service in its THE FRESH MARKET stores. In so doing, The Fresh Market makes itself a part of the communities where it operates. For example, The Fresh Market offers community cooking classes, wine tastings, food sampling, fundraisers (such as its "Root Beer Float" annual fundraiser for the Juvenile Diabetes Research Foundation), and other events.

9. The Fresh Market has met with great success and has quickly grown over the last 20 years. The Fresh Market currently operates 44 stores in 8 states, and, continuing its expansion, is in the process of opening mores stores in additional states, including in Indiana, Ohio, and Illinois. Over the years, The Fresh Market has attracted loyal consumers who have come to find and expect superior quality products and outstanding service, and who associate these qualities with THE FRESH MARKET name and mark.

10. The Fresh Market also offers various food products under its THE FRESH MARKET trademark.

11. The Fresh Market owns the following federal trademark registrations for its THE FRESH MARKET mark:

Mark	Reg. No.	Goods/Services	Reg. Date
THE FRESH MARKET	1,283,775	Retail grocery store services	6/26/84
THE FRESH MARKET & Design	2,329,975	Soup and pimento cheese; pretzels; toasted French bread slices; sauces, excluding cranberry sauce and applesauce; orange juice; retail grocery store services.	3/14/00

12. The Fresh Market's Trademark Registration No. 1,283,775 was declared incontestable on September 6, 1990.

13. Since the first use of its THE FRESH MARKET name and mark, The Fresh Market has extensively advertised and promoted its name and mark, products, and services in a variety of media, including, for example in newspapers and on the Internet.

14. The Fresh Market has established considerable and valuable trademark rights and goodwill in its THE FRESH MARKET name and mark by virtue of its long use of that name and mark, its substantial promotional and marketing efforts, its substantial advertising and promotional expenditures, strong sales and revenues in connection with the name and mark, and third-party acclaim and attention.

Marsh and Its Wrongful Conduct

15. Like The Fresh Market, Marsh operates retail grocery stores.

16. Marsh recently decided to open a chain of specialty food stores, similar in size and concept to Plaintiff's THE FRESH MARKET stores.

17. On March 7, 2003, Marsh (through Trademark Holdings) filed trademark application Serial No. 78/222,973 for the mark ARTHUR'S FRESH MARKET for "retail services featuring foods in supermarkets and convenience stores" on an intent-to-use basis.

18. The Fresh Market understands that before Marsh opened its ATHUR'S FRESH MARKET store, Marsh executives traveled to THE FRESH MARKET stores in Naples, Florida and Greensboro, North Carolina to study the stores, their layout, and their operation.

19. In July, 2004, Marsh opened its specialty food store in Syracuse, Indiana. In addition to copying the size and concept of THE FRESH MARKET stores, Marsh copied the name, calling its store ARTHUR'S FRESH MARKET. As explained in one news article "Marsh's new concept store, Arthur's Fresh Market, launched in early July in Syracuse, Ind., puts deli front and center as part of an overall focus on high-quality perishables and customer convenience."

20. On July 21, 2004, Marsh filed a Statement of Use for its trademark application, alleging a first-use date of July 9, 2004. Marsh's application registered on November 9, 2004 under Registration No. 2,902,361 (the "ARTHUR'S FRESH MARKET Registration").

21. On October 12, 2004, The Fresh Market wrote to Marsh and explained that Marsh's use and registration of ARTHUR'S FRESH MARKET name and mark infringes

The Fresh Market's valuable trademark rights. Marsh's counsel responded on October 15, 2004 denying liability. After further correspondence between counsel, Marsh refused to stop using ARTHUR'S FRESH MARKET or to withdraw its registration.

Harm to The Fresh Market and the Public

22. Marsh's unauthorized use and registration of the ARTHUR'S FRESH MARKET name and mark is likely to cause confusion, mistake, and deception as to the source or origin of Marsh and its services, and is likely to falsely suggest sponsorship, connection, license, or association between Marsh, its services, and its commercial activities, on the one hand, and The Fresh Market, on the other hand.

23. Alternatively, Marsh's actions are likely to cause "reverse confusion," i.e., Marsh will saturate the market with its ARTHUR'S FRESH MARKET trademark such that consumers are likely to erroneously believe that The Fresh Market's products and services emanate from or are sponsored by Marsh.

24. Marsh's activities have irreparably harmed and, if not enjoined, will continue to irreparably harm The Fresh Market and its long-used and federally registered THE FRESH MARKET name and mark.

25. Marsh's activities have irreparably harmed, and if not enjoined, will continue to irreparably harm the public, who has an interest in being free from confusion, mistake, and deception.

26. The Fresh Market has suffered actual damages to be proven at trial.

27. The Fresh Market has no adequate remedy at law.

FIRST CLAIM FOR RELIEF
Federal Trademark Infringement Under
Section 32(1) of the Lanham Act
15 U.S.C. § 1114(1)

28. The Fresh Market repeats and realleges every allegation set forth in paragraphs 1 through 27.

29. Without The Fresh Market's consent, Marsh used and continues to use in commerce a reproduction, counterfeit, copy, and colorable imitation of The Fresh Market's registered THE FRESH MARKET trademark in connection with the sale, offering for sale, distribution, and advertising of services, which use is likely to cause confusion, or to cause mistake, or to deceive, in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1).

SECOND CLAIM FOR RELIEF
Federal Trademark Infringement, False Designation
of Origin, Passing Off, and Unfair Competition
Under Section 43(a)(1)(A) of the Lanham Act,
15 U.S.C. § 1125(a)(1)(A)

30. THE FRESH MARKET repeats and realleges every allegation set forth in Paragraphs 1 through 29.

31. Marsh's actions are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Marsh with The Fresh Market, or as to the origin, sponsorship, or approval of Marsh, its services, and its commercial activities by or with The Fresh Market (or vice versa), and thus constitute trademark infringement of an unregistered mark and false designation of origin in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A).

THIRD CLAIM FOR RELIEF
Common-Law Trademark Infringement and Unfair Competition
Under Indiana State Law

32. The Fresh Market repeats and realleges every allegation set forth in Paragraphs 1 through 31.

33. Marsh's acts constitute common-law trademark infringement, misappropriation of The Fresh Market's goodwill, and unfair competition under Indiana common law.

Prayer For Relief

WHEREFORE, The Fresh Market requests that this Court enter judgment in its favor on each and every claim for relief set forth above and award it relief including, but not limited to, the following:

A. An order declaring that Marsh's use and registration of ARTHUR'S FRESH MARKET in connection with food stores, and/or related goods and services, infringes Plaintiff's THE FRESH MARKET name and mark, and constitutes federal and state common-law trademark infringement and common-law unfair competition, as detailed above.

B. A permanent injunction enjoining Marsh, its respective officers, directors, employees, agents, subsidiaries, distributors, dealers, and all persons in active concert or participation with any of them from using any name, mark, domain name, source-identifier, or designation comprised of or containing FRESH MARKET, or any confusingly-similar name, mark, domain name, source-identifier, or designation in any manner in connection with the operation, advertising, or promotion of food stores and/or the offering, advertising, or promotion of related goods and services.

C. An order enjoining Marsh from representing, by any means whatsoever, directly or indirectly, that Marsh, its services, its goods, and/or its activities originate from, are sponsored by, or are associated, affiliated, or connected with The Fresh Market in any way.

D. An order requiring Marsh to destroy and/or immediately retract all materials comprised of or containing the ARTHUR'S FRESH MARKET name and mark (including but not limited to signage, brochures, print advertisements, billboards, and telephone and yellow pages directory listings).

E. An order requiring Marsh to disseminate corrective advertising and to issue press releases to address the likely confusion that it has caused from its use of ARTHUR'S FRESH MARKET.

F. An Order requiring the U.S. Patent and Trademark Office to cancel the ARTHUR'S FRESH MARKET Registration.

G. An Order requiring Marsh to account for and pay to The Fresh Market all profits arising from Marsh's unlawful acts and that such profits be increased, pursuant to 15 U.S.C. § 1117 and other applicable laws.

H. An Order requiring Marsh to pay The Fresh Market damages, in an amount to be determined, resulting from Marsh's unlawful acts and that such damages be trebled, pursuant to 15 U.S.C. § 1117 and other applicable laws.

I. An Order requiring Marsh to pay The Fresh Market's costs and attorneys' fees in this action, pursuant to 15 U.S.C. § 1117 and other applicable laws.

J. Such other relief as the Court may deem appropriate.

Jury Demand

The Fresh Market demands a trial by jury.

Dated: December 14, 2004

By: s/ Steven C. Shockley

SOMMER BARNARD ATTORNEYS, PC
Steven C. Shockley
One Indiana Square, Suite 3500
Indianapolis, IN 46204

FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P.
Robert D. Litowitz
Douglas A. Rettew
1300 I Street N.W.
Washington, DC 20005-3315

Counsel for Plaintiff
The Fresh Market, Inc.